No. 22-976

In The
Supreme Court of the United States

MERRICK B. GARLAND, ATTORNEY GENERAL, ET AL.,

Petitioners,

v.

MICHAEL CARGILL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICI CURIAE* UNITED STATES SENATORS CYNTHIA LUMMIS, MIKE LEE, ET AL., PROFESSORS OF SECOND AMENDMENT LAW, AND THE INDEPENDENCE INSTITUTE IN SUPPORT OF RESPONDENT AND AFFIRMANCE

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INTERESTS OF *AMICI CURIAE*

Amici United States Senators have a strong interest in preserving our constitutional framework of separated powers.[1] They are keenly interested in ensuring Congress articulates its statutory enactments in a clear and constitutional manner. *Amici* urge this Court to adopt statutory interpretation methodologies that affirm the apposite roles of both Congress and this Court and take into account the realities of the legislative process.

Amici have introduced or co-sponsored legislation relating to firearms. They also serve on committees with jurisdiction over firearms, including the Senate Committee on the Judiciary.

Amici Senators are:

Sen. Cynthia M. Lummis (Wyoming)
Sen. Mike Lee (Utah)
Sen. Kevin Cramer (North Dakota)
Sen. John Barrasso (Wyoming)
Sen. Pete Ricketts (Nebraska)
Sen. Steve Daines (Montana)
Sen. Cindy Hyde-Smith (Mississippi)
Sen. Mike Rounds (South Dakota)
Sen. Markwayne Mullin (Oklahoma).

Founded in 1985 on the eternal truths of the Declaration of Independence, the Independence Institute is a 501(c)(3) public policy research organization based in Denver, Colorado. The briefs and scholarship of

[1] No counsel for any party authored the brief in any part. Only *amici* funded its preparation and submission.

Research Director David Kopel have been cited in seven opinions of this Court, including *Bruen*, *McDonald* (under the name of lead *amicus* Int'l Law Enforcement Educators & Trainers Association (ILEETA)), and *Heller* (same). Kopel has also been cited in over one hundred opinions of lower courts. The Institute's Senior Fellow in Constitutional Studies, law professor Robert Natelson, has been cited in a dozen opinions by Justices of this Court.

Amici law and history professors teach or write on the Second Amendment and on administrative law related to firearms. They are familiar with the problem of citizens having their lawfully acquired property declared to be contraband by questionable administrative fiat.

Like the Senators, the Professors and the Independence Institute are keenly interested in upholding our constitutional framework and ensuring that criminal statutes enacted by legislatures are clearly written and are not changeable based on the Executive Branch's shifting whims.

Cited by this Court in *Heller* and *McDonald*, and oft-cited by lower federal courts and state high courts, *amici* professors include authors of the first law school textbook on firearms law, and many other books and law review articles on the subject.

For the professors, institutional affiliations are for identification purposes only.

Royce de R. Barondes is the James S. Rollins Emeritus Professor of Law at the University of Missouri School of Law. Before retiring, he taught firearms law and business law subjects. He has published articles on firearms law in the (U. Virginia) *Journal of Law & Politics*, *Texas Review of Law & Politics*, *Houston Law Review*, *Regent University Law Review*, *Idaho Law Review*, and *Southern Illinois University Law Journal*. His scholarship concerning firearms law has been cited by the Supreme Court of Pennsylvania, the Eastern and Western Districts of Texas, and by a dissent in the Supreme Court of Iowa.

F. Lee Francis is an Assistant Professor at Mississippi College Law, where he teaches Civil Procedure and Administrative Law. He also serves as the Director of the Center for Litigation and Alternative Dispute Resolution. Before joining the faculty in 2023, he served in the Army JAG Corps and as a federal prosecutor with the U.S. Attorney's Office (E.D.N.C.). His research and scholarship focus on the Second Amendment and firearms law. He is the author of *Armed and Under the Influence: The Second Amendment and the Intoxicant Rule After Bruen*, forthcoming in the Marquette Law Review. His articles have also appeared in the *Southern University Law Review*, *Southern Illinois University Law Review*, and *Brazilian Journal of Public Policy.* His work has been cited by the Fifth Circuit and the Eastern District of Michigan.

Nicholas J. Johnson is a Professor of Law at Fordham University, School of Law. He is coauthor of

the first law school textbook on the Second Amendment, *Firearms Law and the Second Amendment: Regulation, Rights, and Policy* (Aspen Publishers 3d ed. 2022) (with David B. Kopel, George A. Mocsary, E. Gregory Wallace, and Donald Kilmer). The casebook has been cited in 29 opinions, including this month by both the majority and dissent in the Third Circuit (*Lara v. Commissioner Pennsylvania State Police*), by the Illinois Supreme Court (*People v. Chairez*), and then-Judge Kavanaugh's dissent in *Heller II*.

Professor Johnson is also author of *Negroes and the Gun: The Black Tradition of Arms* (2014). He has written 14 law journal articles on the right to arms, including in *Law and Contemporary Problems*, *Hastings Law Review*, *Ohio State Law Journal*, and *Wake Forest Law Review*. Courts citing his right to arms scholarship include the Seventh Circuit, Eastern District of New York, and Washington Court of Appeals.

Donald E.J. Kilmer, Jr., is Professor of Constitutional Law at Lincoln Law School in San Jose, where his courses include Second Amendment and Firearms Law. His en banc Ninth Circuit case *Nordyke v. King* was the first federal case to hold the Second Amendment incorporated against states via the Fourteenth Amendment. Having litigated many arms law cases, he brings a practitioners' perspective to the coauthored textbook Nicholas J. Johnson, David B. Kopel, George A. Mocsary, E. Gregory Wallace, & Donald E. Kilmer, *Firearms Law and the Second Amendment: Regulation, Rights and Policy* (Aspen Publishers 3d ed. 2022).

Joyce Malcolm is emerita Professor of Law at George Mason University, Antonin Scalia Law School. Previously she was the Patrick Henry Professor of Constitutional Law and the Second Amendment. She is also a council member of the National Endowment for the Humanities.

Professor Malcolm is author of nine books on British and American history, most notably *To Keep and Bear Arms: The Origins of an Anglo-American Right* (Harvard Univ. Pr. 1994).

Her work was cited by the majority opinions in *District of Columbia v. Heller* and *McDonald v. Chicago*, and by Justice Thomas's concurrence in *Printz v. United States*. She has also been cited in 51 cases in lower courts, including by then-Judge Barrett's dissent in *Kantar v. Barr*.

Joseph V. Muha is Adjunct Professor of Law at the University of Akron, where he has taught health care law and currently teaches arms law. He has written about arms law in the *Western Michigan University Cooley Journal of Practical and Clinical Law*.

Joseph E. Olson is emeritus Professor of Law at Mitchell Hamline School of Law, where he taught Second Amendment, business law, and tax law.

His scholarship on the right to arms was cited by *District of Columbia v. Heller*, and in a dozen lower court cases, including the Ninth Circuit, and the Supreme Courts of Connecticut and Washington.

Professor Olson has written 8 articles on the right to arms, including in the *Stanford Law and Policy Review*, *Georgetown Journal of Law & Public Policy*, and *University of Michigan Journal of Law Reform*.

David A. Raney is Professor of History and holds the John Anthony Halter Chair in American History, the Constitution, and the Second Amendment at Hillsdale College. He specializes in teaching American history, including the right to arms.

Glenn H. Reynolds is the Beauchamp Brogan Distinguished Professor of Law at the University of Tennessee College of Law, where he teaches constitutional law and technology law.

The Seventh Circuit cited his scholarship as a model of "originalist interpretive method as applied to the Second Amendment." *Ezell v. City of Chicago*, 651 F.3d 684, 699 n.11 (7th Cir. 2011). The writings of Professors Kopel and Mocsary were likewise cited as originalist models.

Professor Reynolds' right to arms scholarship has also been cited by 7 Circuit Courts of Appeals, 20 U.S. District Courts, the Supreme Courts of Kentucky and Oregon, and the Illinois and New Jersey intermediate appellate courts.

His 16 law journal articles on the right to arms have been published, *inter alia*, in the *Columbia Law Review*, *Northwestern University Law Review*, *Texas Law Review*, *University of Pennsylvania Law Review*, and *Virginia Law Review*.

E. Gregory Wallace is Professor of Law at the Norman Adrian Wiggins School of Law at Campbell University. He is also a member of the North Carolina State Advisory Committee to the U.S. Commission on Civil Rights.

Professor Wallace is a coauthor of the Johnson et al. *Firearms Law* textbook described above. His articles on arms law have appeared in the *Tennessee Law Review* and *Southern Illinois University Law Journal*. They have been cited in the Seventh Circuit and two U.S. District Court cases.

SUMMARY OF ARGUMENT

This Court should hold *Chevron* deference inapplicable to the interpretation of criminal statutes, including the National Firearms Act's definition of "machinegun" at issue in this case. Granting deference to an agency's interpretation of a statute when the agency has both formulated the interpretation and is responsible for bringing criminal prosecutions under its interpretation raises especially serious separation of powers and due process concerns.

As this case evinces, *Chevron* can often result in wild swings in policy as new Presidents take office. Interpretation of criminal statutes is poorly suited to agency reversals of the type that *Chevron* enables.

Regarding the particular text of the National Firearms Act (NFA), some of the arguments in support of

Petitioners urge interpreting the NFA as if Congress had chosen different words than the words Congress actually did choose.

Because penal sanctions deprive citizens of life, liberty and property, criminal statutes are subject to higher substantive and procedural protections under the Constitution. This Court should apply the rule of lenity when criminal statutes are written unclearly. The reasonable doubt standard for the rule of lenity is the least subjective formulation of the canon and has significant grounding in our Nation's history and jurisprudence.

This Court safeguards the separation of powers and democratic accountability when its precedents encourage Congress to speak clearly and precisely in enacting statutes.

ARGUMENT

I. *Chevron*'s unlawful delegation and the resulting instability are harmful for criminal law.

A. The separation of powers is especially important in criminal law, and *Chevron* permits unlawful delegation.

This Court is currently considering the future of *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and its progeny, in other cases. *See Loper Bright v. Raimondo*, No. 22-451 (2023); *Relentless, Inc.,*

et al. v. Dept. of Commerce, et al., No. 22-1219 (2023). As some *amici* Senators in the instant case argued in *Loper Bright*, there are compelling and just reasons for this Court to find that *Chevron* does not comport with our constitutional separation of powers. *Chevron* fosters an unlawful delegation of authority from Congress and the Judiciary to the Executive Branch. Congress, not the Executive, is responsible for making laws. *See, e.g., United States v. Davis*, 139 S. Ct. 2319, 2323 (2019) ("Only the people's elected representatives in Congress have the power to write new federal criminal laws."). Interpreting the law is not an Executive Branch power; *Chevron* contradicts "the province and duty of the judicial department to say what the law is." *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *Brief Amici Curiae in Support of Petitioners of Senators Ted Cruz, Cynthia M. Lummis, et al.*, in *Loper Bright Enterprises v. Raimondo*, No. 22-451 (July 24, 2023).

This case exemplifies the pernicious effects of *Chevron* in the criminal context, where separation of powers and personal liberty concerns are at their apex.

The Department of Justice (DOJ) explicitly invoked *Chevron* as its legal authority when adopting its final administrative rule on bump stocks in 2018 (Final Rule), proscribing possession of bump stocks under the National Firearms Act of 1934 (NFA). *See Bump-Stock-Type Devices*, 83 Fed. Reg. 66514, 66527 (2018). The Final Rule stated:

> Congress thus implicitly left it to the Department to define "automatically" and "single function of the trigger" in the event those terms are ambiguous. *See Chevron*, 467 U.S. at 844. Courts have appropriately recognized that the Department has the authority to interpret elements of the definition of "machinegun" like "automatically" and "single function of the trigger." *Id*.

The asserted rule stated that "the Department's construction of those terms is reasonable under *Chevron*." *Id.*

The Courts of Appeals in the bump stock cases divided on the applicability of *Chevron.* The D.C. Circuit agreed with the *Chevron*-based justification of the Final Rule; "in the criminal context, as in all contexts, the separation of powers 'does not prevent Congress from seeking assistance from its coordinate Branches' so long as Congress 'lays down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform.'" *Guedes v. BATFE*, 920 F.3d 1, 25 (D.C. Cir. 2019) (citations omitted). The Tenth Circuit agreed: "Because the precedents cited call for the application of *Chevron*, we now examine the Final Rule under *Chevron*." *Aposhian v. Barr*, 958 F.3d 969, 984 (10th Cir. 2020).

Conversely, the Fifth Circuit held that "*Chevron* does not apply here because the statutory language at issue implicates criminal penalties." *Cargill v. Garland*, 57 F.4th 447, 468 (5th Cir. 2023). The Sixth Circuit agreed that this Court's precedents "cannot be

read to support the proposition that the agency's interpretation of a criminal statute receives *Chevron* deference." *Gun Owners of Am. v. Garland*, 992 F.3d 446, 457 (6th Cir. 2021). Likewise, the Navy-Marine Corps Court of Criminal Appeals stated in a bump stock case, "On balance, we are skeptical that when the judiciary interprets an ambiguous criminal statute it must defer to the judgment of the same executive who is prosecuting the defendant." *United States v. Alkazahg*, 81 M.J. 764, 777 (N-M. Ct. Crim. App. 2021).

This Court's precedents on the applicability of *Chevron* to criminal statutes are mixed. According to *United States v. Apel*, the Court has "never held that the Government's reading of a criminal statute is entitled to any deference." 571 U.S. 359, 369 (2014); *cf. Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1155 (10th Cir. 2016) (Gorsuch, J., concurring) ("The Supreme Court has expressly instructed us not to apply *Chevron* deference when an agency seeks to interpret a criminal statute."). As this Court has declared, "criminal laws are for the courts, not for the Government, to construe." *Abramski v. United States*, 573 U.S. 169, 191 (2014); *cf. Whitman v. United States*, 574 U.S. 1003 (2014) (Scalia, J., joined by Thomas, J., respecting denial of certiorari) (agreeing that the case was a poor vehicle for review, but criticizing *Chevron* deference in a criminal case as replacing the doctrine of lenity "with a doctrine of severity").

In some earlier cases, however, *Chevron* deference was accorded to agency interpretations of criminal

statutes. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* deferred to a Department of Interior rule that interpreted a criminal provision of the Endangered Species Act. 515 U.S. 687, 703 (1995) (citing *Chevron*). In *United States v. O'Hagan*, a Securities and Exchange Commission rule that implicated criminal penalties for insider trading was granted *Chevron* deference. 521 U.S. 642, 673 (1997) ("Because Congress has authorized the Commission, in §14(e), to prescribe legislative rules, we owe the Commission's judgment 'more than mere deference or weight.' . . . [W]e must accord the Commission's assessment 'controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.' ") (quoting *Chevron*, 467 U.S. at 844).

As the *Alkazahg* court summarized, "the Supreme Court as a whole has not conclusively provided an answer to whether *Chevron* deference applies in criminal cases where an ambiguous statute is defined by an agency rule subject to notice and comment rulemaking procedures." 81 M.J. 764, 777 (N-M. Ct. Crim. App. 2021).

Whatever the result in *Loper Bright* and *Relentless*, this Court should accept the invitation offered by this case to hold that *Chevron* has no applicability to interpretation of a criminal statute. Because of the high and severe stakes for the criminal defendant, judicial interpretation should be *de novo*.

In this case, DOJ is both the lawmaker and the law enforcer. DOJ created the Final Rule that interpreted

the definition of "machinegun" in the NFA, 26 U.S.C. 5845(b), to include bump stocks. And DOJ exercises the power to bring criminal prosecutions based on its own interpretation.[2] Rather than respecting the separation of powers, *Chevron* has been used to consolidate powers: the Executive Branch declares what the law is, and then brings felony prosecutions based on its declaration.

Only if a court determines *de novo* that the plain meaning of a statute naturally encompasses a prosecutor's asserted meaning should a citizen be subject to criminal conviction and loss of life, liberty, or property. Criminal liability is a constitutional issue of the first order.

Because criminal liability is a fundamental matter, thirteen sections of the Constitution address it. *See* U.S. Const. art. I, §3 (impeached officers may also be criminally convicted); art. I, §6 (no criminal liability for congressional Speech or Debate); art. I, §8 (subjects on which Congress may create criminal liability); art. I, §9 (forbidding criminal liability from a Bill of Attainder or ex post facto Law); art. I, §10 (same, for State Law);

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[2] The National Firearms Act of 1934 created a tax and registration system for machine guns. The Gun Control Act of 1968, as amended in 1986, forbids the acquisition of machine guns manufactured after the effective date of the amendments, namely May 19, 1986. *See* 18 U.S.C. §921(a)(24) ("machinegun" has same meaning as in NFA); §922(o) (forbidding nongovernment acquisition of new machine guns).

The NFA uses the spelling "machinegun," whereas modern spelling splits to "machine gun." This brief uses the current spelling, except in quotations.

art. III, §3 (defining criminal liability for treason, and setting restrictions on congressional statutes for punishment thereof); amend. I (the exercise of certain natural rights may not be subject to criminal liability); amend. II (same); amend. V (double jeopardy, procedural requirements for imposition of criminal penalties); amend. VI (more procedural requirements); amend. XIV, §1 (multiple restrictions on criminal liability); amend. XVIII, §2 (authorizing Congress and the States to impose criminal liability for intoxicating liquors); amend. XXI, §2 (repeal of XVIII; outlawing transportation or importation of intoxicating liquor into nonconsenting States).

The *Chevron* standard is loose for Executive Branch expansion of criminal liability; anything is allowed, short of arbitrary and capricious. The Constitution's text, considered cumulatively, perhaps counsels a higher standard.

While the Sixth Circuit did not rely on *Chevron* and the D.C. Circuit did, both courts held that the Final Rule was justified by *Touby v. United States*, 500 U.S. 160 (1990). *See Gun Owners of Am., Inc. v. Garland*, 19 F.4th 890, 903 (6th Cir. 2021); *Guedes v. BATFE*, 920 F.3d 1, 28 (D.C. Cir. 2019). *Touby* affirms that Congress can expressly delegate to an agency the power to outlaw items. This is true, but irrelevant here.

Unlike *Touby*, this case does not involve a Delegation Doctrine challenge. Both sides agree that BATFE has the authority to adopt any regulation that is

compliant with the statutory text of the National Firearms Act. No more, and no less.

The statute at issue in *Touby*—an amendment to the Controlled Substances Act (CSA)—showed how Congress sometimes expressly delegates the power to criminalize additional items. In the Controlled Substances Act, Congress prohibited or restricted various substances; and expressly delegated to the Drug Enforcement Agency (DEA) the power to add new substances to the controlled substances schedules. Later, Congress expressly delegated to the DEA a more limited power to temporarily schedule substances without prior notice and comment. The effect of temporary scheduling was to criminalize possession of the substance. 500 U.S. 160, 165-66 (1990); 21 U.S.C. §811. The *Touby* Court upheld the temporary scheduling because the statutory criteria were sufficiently "intelligible . . . even if greater congressional specificity is required in the criminal context." *Touby* at 166.

Although the statute had declared temporary scheduling "not subject to judicial review," the Court held (as the Solicitor General had conceded) that judicial review was available as a defense in a criminal prosecution. It was only preenforcement review that would have to wait until the temporary scheduling later went through notice-and-comment to become permanent scheduling. *Id.* at 168-69.

Touby involved an express congressional grant of power to the Drug Enforcement Agency to add newly-invented substances to the Controlled Substances Act.

In contrast, only an "implicit" grant is asserted to have come from the National Firearms Act. *See Aposhian v. Wilkinson*, 989 F.3d 890, 900 n.6 (10th Cir. 2021).

The *Touby* case affirms congressional power expressly to delegate the definition of criminal offenses. The difference between *Touby* and the instant case is that in *Touby*, Congress explicitly granted the Drug Enforcement Agency the power to add new substances to the controlled substances list. In the National Firearms Act, there is no such grant. To the contrary, the NFA statute itself defines what is unlawful. The NFA does not delegate the power to expand, contract, or go beyond any statutory definition.

Touby would be supportive of the Final Rule if Congress had expressly delegated to BATFE a power to expand federal laws against arms, ammunition, or accessories.

B. *Chevron* fosters agency reversals.

This case highlights another *Chevron* flaw—agency reversals. Starting in 2006 and continuing through 2017, ten legal decisions of the Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE), held that bump stock devices were not a "machinegun" as defined by the NFA. *Final Rule*, at 66517.[3] The BATFE

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[3] The decisions are collected in the Joint Appendix. Decisions that use the word "bump" are, in Joint Appendix order, dated: Oct. 13, 2006; June 7, 2010; July 13, 2012; July 9, 2012; Feb. 11, 2013; May 1, 2013; Jan. 14, 2014; July 31, 2014; June 29, 2015; Apr. 6, 2017.

"ultimately concluded that these devices did not qualify as machineguns because . . . they did not 'automatically' shoot more than one shot with a single pull of the trigger." *Id.* Then in 2018, the Bureau reversed all prior legal opinions. In the new 2018 view, none of the ten prior decisions "extensively examined the meaning of 'automatically.'" *Id*.

It seems surprising that a bureau would neglect plain statutory text ten out of ten times, and then get things right on the eleventh try. As then-Judge Kavanaugh observed in 2016, "*Chevron* encourages the Executive Branch (whichever party controls it) to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints." Brett Kavanaugh, *Fixing Statutory Interpretation, Judging Statutes*, 129 Harv. L. Rev. 2118, 2150 (2016).

Or as Justice Gorsuch explained:

> When the law's meaning is never liquidated by a final independent judicial decision, when executive agents can at any time replace one reasonable interpretation with another, individuals can never be sure of their legal rights and duties. Instead, they are left to guess what some executive official might "reasonably" decree the law to be today, tomorrow, next year, or after the next election.

Buffington v. McDonald, 143 S. Ct. 14, 20 (2022) (Gorsuch, J., dissenting). Even if arguments can be made for *Chevron* in routine administrative matters (such as

the meaning of "stationary source" in the Clean Air Act), or in civil cases, it is overreach to permit agencies freely to reverse themselves, impose criminal liability with the reversal, and turn the reversal into the full force of the Federal penitentiary.

Precedents that cause legal instability are particularly appropriate for reversal. *See, e.g., Randall v. Sorrell*, 548 U.S. 230, 243 (2006) (*stare decisis* exists to "avoid[ ] the instability and unfairness that accompany disruption of settled legal expectations"); *Okla. Oil & Gas Ass'n v. Thompson*, 414 P.3d 345, 350 (Okla. 2018) ("stare decisis is intended to counter 'capricious instability' ").

Today, *Chevron* is such a precedent. As a recent law review article explained, "the increasing political polarity in America makes *Chevron*, as originally envisioned, a source of extreme instability in our legal system. Political polarity combined with *Chevron* will create (and has already created) radical changes in the meaning of numerous laws every few years." Richard Pierce, Jr., *The Combination of Chevron and Political Polarity Has Awful Effects*, 70 Duke L.J. Online 91, 92 (2021).

It is unsettling to think that something that is legal one day can be subject to criminal sanctions the next with no intervening act of Congress. That, more than anything, evinces a clear separation of powers problem. Such changes are characteristic of the legal environment of an authoritarian regime, not the United States.

This case brings to mind the warning given by James Madison in *Federalist* 47: "accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." One reason only Congress should impose criminal penalties is the importance and legitimacy of the people's elected representatives enacting laws that deprive a person of liberty, property, or life. Our constitutionally separated powers should not permit unelected functionaries to create new crimes with the stroke of a pen.

Our Constitution requires nothing less. Article I, section 1, clause 1 states: "All legislative powers herein granted shall be vested in a Congress of the United States." Likewise, Article I, section 7 requires passage of the same legislative proposal by both Houses of Congress followed by presentment to the President as conditions precedent for the enactment of a federal law. The Constitution could not be clearer: neither unelected functionaries nor anyone other than Congress has the authority to make federal law creating entirely new crimes—with the stroke of a pen. *Chevron* is not fit for use in the criminal law context.

The position of the DOJ in this case is telling. Although the DOJ invoked *Chevron* when creating the Final Rule, the Solicitor General here does not seek *Chevron* deference for the Department's interpretation of "machinegun"; that case is not cited in the Government merits brief. *See* Pet. Brief, *Garland v. Cargill*, No. 22-976 (2023).

The Federalist 62 described the disadvantages of instability in government, which the author (Hamilton or Madison) expected to be reduced by six-year senatorial terms. The limitless agency reversals allowed by *Chevron* promote the legal instability that our Constitution is intended to prevent:

> The internal effects of a mutable policy are still more calamitous. It poisons the blessings of liberty itself. It will be of little avail to the people that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulged, or undergo such incessant changes that no man who knows what the law is today can guess what it will be tomorrow. Law is defined to be a rule of action; but how can that be a rule, which is little known and less fixed?

This Court should enforce the separation of powers in the criminal law context, where strict fidelity to the Constitution is especially important. *Chevron* deference should be inapplicable to criminal statutes and agency reversals. This case involves both.

II. Petitioners and *amici* have not come to terms with the text of the NFA.

Petitioners' *amici* argue that bump stocks ought to be encompassed by the National Firearms Act, but the plain text and regulatory history of the statute are unsupportive.

First, many *amici* urge that the NFA must be construed to encompass every "rapid fire" gun. But it is indisputable that the NFA's definition of "machinegun" is narrower. Consider the Gatling gun. Patented in 1862 (No. 36,836), the Gatling has been widely described as a "machine gun," which it may be in a functional sense, but not as defined by the NFA.

The original Gatling gun, as improved over the 1860s, had six or ten barrels; a single barrel would have melted from the very quick succession of gunpowder explosions. The Gatling is fed from an ammunition belt, as many future machine guns would be. It is operated by a hand crank. As the user rotates the barrels successively into alignment with the next round of ammunition, the gun fires. *See* 1 George M. Chinn, THE MACHINE GUN: HISTORY, EVOLUTION, AND DEVELOPMENT OF MANUAL, AUTOMATIC, AND AIRBORNE REPEATING WEAPONS 48-57 (Bureau of Ordnance, Dept. of the Navy 1951).

The Gatling gun was "advertised as firing 300 to 500 shots a minute," and "any time reliably constructed ammunition was used, the weapon's performance was equal to, and sometimes beyond, the claims of its promoters." *Id.* at 56-57. With continuing improvements, "By 1880 Gatling was getting fire at a rate of 1,200 rounds per minute from his light gun." *Id.* at 60. It was adopted by militaries around the world. *Id.* at 57-59. It

was also purchased by citizens, militias, or police departments who could afford it.[4]

In July 1863 in New York City, anti-draft rioters set buildings on fire, tore up rails, and cut down telegraph poles, causing over two million dollars in damage (about $48 million today). According to the *New York Times*, when a mob targeted the *Times* building, the *Times* mounted two Gatling guns in windows, and one on the roof; *Times* editor Henry Jarvis Raymond manned one of them. The rest of the *Times* staff had rifles. *See* Robert C. Kennedy, *How to Escape the Draft*, N.Y. Times, "On this Day, Aug. 1, 1863"[5]; Julia Keller, MR. GATLING'S TERRIBLE MARVEL 167-68 (2008).

"When the livid citizens approached the newspaper office, their gaze rose up and up and up to the rooftop, where they saw the gleaming barrels of the ultimate deterrent: a Gatling gun. . . . The mob backed down." *Id.* at 168.

While Petitioners' *amici* insist that the NFA must be interpreted to apply to any "rapid fire" firearm, the argument is unsustainable in light of the statutory language and derivative federal regulation. Not appearing

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[4] As of 1874-76, average sales prices by the Gatling Gun Company were $850 to $1,800, depending on model. Paul Wahl & Don Toppel, THE GATLING GUN 70-71 (2d printing 1971).

[5] https://archive.nytimes.com/www.nytimes.com/learning/general/onthisday/harp/0801.html. The first published version of the story was authored by a *Times* writer in 1921. *See* Elmer Davis, HISTORY OF THE NEW YORK TIMES 59-60 (1921).

in Petitioners' brief or any supporting *amici* are the regulatory rulings relating to Gatling guns.

In the 1950s, the NFA was administered by the Department of the Treasury's Alcohol Tax Unit, which is the predecessor of today's BATFE. In 1955, the ATU ruled that the hand-cranked Gatling gun was not encompassed by the NFA. And obviously so. Rather than being operated "automatically" by a "single function of the trigger," Gatling guns operate as the user continues the physical motion of turning the crank. *See* Dep't of the Treasury, Revenue Ruling 1955-523.[6]

In 2004, the Bureau of Alcohol, Tobacco, Firearms, and Explosives again explained why. *See* Dep't of Justice, ATF Ruling 2004-5.[7] Here, the BATFE ruled that the "six-barrel, electrically powered" "Aircraft Machine Gun," commonly known as the "Minigun," is a NFA "machinegun." BATFE explained why the Minigun is a NFA "machinegun" and the classic Gatling gun is not. Unlike the hand-cranked Gatling gun, the Minigun "shoots more than one shot, without manual reloading, by a single function of the trigger." *Id.* While the Gatling gun and the Minigun both have multiple rotating barrels, "the Minigun does not incorporate any of Gatling's original components and its feed mechanisms are entirely different." *Id.* "The original Gatling Gun is a rapid-firing, hand-operated weapon.

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[6] https://www.atf.gov/firearms/docs/ruling/1955-528-classification-crank-operated-gear-driven-gatling-guns.

[7] https://www.atf.gov/firearms/docs/ruling/2004-5-minigun-ruling/download.

The rate of fire is regulated by the rapidity of the hand-cranking movement, manually controlled by the operator. The original, crank-operated Gatling Gun, and replicas thereof, are not automatic firearms or machineguns as defined." *Id.*[8]

Thus, today a citizen can buy a modern replica of the classic Gatling gun, capable of firing modern ammunition. The federal laws for sale are the same as for other firearms that are not machine guns.

There is no dispute that a Gatling gun is capable of "rapid fire." For all the words that Petitioners and Petitioners' *amici* spend insisting that the NFA must be construed to outlaw every "rapid fire" gun, the long-standing, unchallenged BATFE Rulings about Gatling guns belie the claim. No brief on Petitioners' side addresses the issue, even though the 2004 Ruling is the first item in the Joint Appendix.

The reason is obvious. The NFA definition has nothing to do with rate of fire. The NFA definition of "machinegun" includes many firearms that fire more slowly than any genuine machine gun, including Gatlings or Thompson submachine guns. For example, some firearms that are classified as NFA "machineguns" fire two or three shots with a single trigger pull. *See* Stephen Halbrook, FIREARMS LAW DESKBOOK §6:6 (2023 ed.). This is very different from the continuous rapid

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[8] The 1955 Ruling had said some, not all, electrically-powered Gatling guns (patented July 25, 1893, no. 502,185) are NFA "machineguns." That part of the ruling was superseded to the extent inconsistent with the 2004 Ruling. ATF Ruling 2004-5.

fire that colloquial usage associates with machine guns.

It might seem surprising that a gun that fires two shots per trigger function is an NFA "machinegun," whereas "rapid-fire" Gatling guns are not. The statutory NFA definition is not based on rate of fire.

Petitioners and supportive *amici* strive to persuade that the NFA definition actually means "rapid fire." The text does not say so, nor do the Gatling gun Rulings.

Only a single brief in support of Petitioners even contains the word "Gatling": "the advent of the machine gun goes back at least to 1861, with the invention of the Gatling gun. . . ." Patrick Charles Br., at 4.[9] That brief then abandons the subject to develop a theory that the NFA really means a "single pull of the trigger," rather than the statutory text of "single function of the trigger." The "pull" theory elides the Gatling gun issue because that gun does not operate by pulling a trigger.

The Charles amicus brief lists sources that described the NFA as applying to a "pull" of the trigger, such as in regard to WWII trophies that had been captured by American soldiers. Charles Br., at 23-32.

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[9] To be precise, the first machine gun dates back to at least 1580, with a wheel-lock gun (predecessor of the flintlock) that with one trigger pull fired 16 "superposed" rounds, the rounds being stacked on one another. *See* Lewis Winant, FIREARMS CURIOSA 168-70 (2009) (1st pub. 1954). The first machine gun in the modern sense was the 50-barrel Belgian *mitrailleuse*, invented in 1851. *See* Chinn, at 64.

Other amicus briefs for Petitioner also propound the "single pull" theory. *See* District of Columbia Br., at 6-14; American Medical Assoc. Br., at 31-34; Constitutional Accountability Center Br., at 9-12.

If Congress had enacted a statute that said "single pull," then a serviceman who came home with an old Maxim or Vickers machine gun (which use push triggers, Pet. Br., at 22) would have been exempt from the NFA. The formal regulatory Rulings of 1955 and 2004, which are not cited by Petitioners' *amici*, noncolloquially used the actual NFA text, "single function."

Mr. Charles argues that following the statutory text of "function" rather than his preferred "pull" "would mean that the Tommy Gun and other contemporaneous, multi-functional submachine guns and automatic-fire capable firearms conceivably fell outside the definition of a 'machine gun,' given that these firearms, even when placed in automatic-fire mode, could technically fire a single shot with a quick pull and release of the trigger." Charles Br., at 16-17.

The argument is implausible. The Charles theory overlooks the NFA statutory definition, "any weapon which shoots . . . " 26 U.S.C. §5845(b). The definition is based on the characteristics of the firearm, and is not evaded by the user exercising an option to only fire a single shot on a given occasion.

Wisely, Congress chose "function" instead of "pull," and Petitioners' brief explains why. Triggers can be designed to be engaged in a variety of ways, including by being "pushed." Pet. Br., at 21-22. Instead of "pull" or

"pull or push," Congress enacted the more comprehensive language "single function of the trigger." 26 U.S.C. §5845(b).

When using a bump stock, the user fires each shot "by a single function of the trigger," either by pulling the trigger with the user's finger or pushing the trigger into the user's finger.

The NFA could, arguably, be criticized for being underinclusive and overinclusive. If there is something to be fixed, the solution must come from legislation enacted by Congress. As Senator Dianne Feinstein explained when introducing legislation to amend the NFA to include bump stocks:

> Unbelievably, the regulation hinges on a dubious analysis claiming that bumping [*i.e.*, pushing] the trigger is not the same as pulling it. . . . Both Justice Department and ATF lawyers know that legislation is the only way to ban bump stocks. The law has not changed since 1986, and it must be amended to cover bump stocks. . . .

S. Comm. on the Judiciary, Press Release, *Feinstein Statement on Regulation to Ban Bump Stocks* (Mar. 23, 2018).[10]

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[10] https://www.judiciary.senate.gov/press/dem/releases/feinstein-statement-on-regulation-to-ban-bump-stocks.

III. Clear drafting in criminal statutes is essential

A. The "reasonable doubt" standard of the rule of lenity is constitutionally appropriate.

Fair notice of the requirements of a criminal statute is a fundamental constitutional right. The best means of fostering fair notice is application of the rule of lenity based on a reasonable doubt standard—whether reasonable minds could disagree about the scope of a statute. *See Wooden v. United States*, 142 S. Ct. 1063, 1084 (2022) (Gorsuch, J., & Sotomayor, J., concurring) (noting that "this Court's early cases" used a reasonable doubt standard); *Moskal v. United States*, 498 U.S. 103, 108 (1990) ("[W]e have always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope. . . .").

A "reasonable doubt" standard is much easier to apply than the "grievous ambiguity" standard announced in dicta in *Huddleston v. United States*, 415 U.S. 814, 831 (1974); *Wooden*, 142 S. Ct. at 1084-85 (Gorsuch, J., & Sotomayor, J., concurring) (criticizing *Huddleston*).

The "grievous ambiguity" approach adds complexity to judicial review by forcing jurists to consider how much ambiguity is enough. Measuring "grievous" ambiguity is difficult. "One major problem with that kind of ambiguity trigger is that ambiguity is in the eye of the beholder and cannot be readily determined on an

objective basis." *Wooden*, 142 S. Ct. at 1076 (Kavanaugh, J., concurring).

It is a simpler judicial task to determine whether reasonable minds can disagree. As shown by the instant case, reasonable doubt might be inferred where there are thoughtful and thoroughly-analyzed, but conflicting, opinions on a statute's meaning from multiple neutral judicial arbiters.

The "reasonable doubt" standard is particularly easy to use for the rule of lenity because there is substantial case law governing reasonable doubt in the criminal law. If reasonable minds can disagree about the meaning of a criminal statute enacted by Congress, then the scope of what is criminalized extends to what is clear, and not to what is doubtful.

The competing standard for the rule of lenity—namely "grievous ambiguity"—seemingly appeared out of thin air in a 1974 dictum. *See* FAMM Amicus Br., at 10-11 (discussing *Huddleston v. United States*, 415 U.S. 814, 831 (1974)).

In a case involving the same section of the National Firearms Act (section 5845, at issue in *Cargill*), this Court produced four different opinions, and not one of them asserted that the rule of lenity applied only when ambiguity was "grievous." Justice Souter's plurality opinion simply stated, "After applying the ordinary rules of statutory construction, then, we are left with an ambiguous statute." *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517 (1992) (plurality op.). While the *Thompson/Center* case immediately

concerned whether the manufacturer had to pay a NFA tax, failure to pay the tax was a criminal offense with "no additional requirement of willfulness," so it was "proper" "to apply the rule of lenity." *Id.* at 517-18. Justice Scalia's concurrence thought that different words in the statute were "sufficiently ambiguous to trigger the rule of lenity." *Id.* at 519 (Scalia, J., concurring). Dissenting Justices White and Stevens considered the statute unambiguous, so lenity was inapplicable. *Id.* at 523 (White, J., dissenting); 525-26 (Stevens, J., dissenting).

Although "grievous ambiguity" has thin support in this Court's precedents, and none from the Founding, the reasonable doubt standard is well-grounded in our legal tradition. It is based on the Anglo-American rule that penal statutes must be strictly construed. Strict construction of penal statutes had been affirmed in English common law treatises that were widely influential in the American colonies. *See* 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 88 (1765) ("Penal statutes must be construed strictly."); 2 Matthew Hale, THE HISTORY OF THE PLEAS OF THE CROWN 335 (1736) ("only in such cases and as to such persons, as are expressly comprised within such statutes [ousting benefit of clergy] . . . such statutes are construed literally and strictly.").

Chief Justice Marshall, riding circuit in 1812, affirmed that "Penal laws should be construed strictly." *The Adventure*, 1 F. Cas. 202, 204 (C.C. Va. 1812) (No. 93) (Marshall, C.J.). Similarly, Justice Story, riding circuit that same year, declared that "It is a principle

grown hoary in age and wisdom, that penal statutes are to be construed strictly. . . . I will not be the first judge, to strain a proviso against [a] citizen, beyond the fair import of its expressions." *United States v. Mann*, 26 F. Cas. 1153 (C.C. N.H. 1812) (No. 15,718).

In an 1820 case before this Court, Chief Justice Marshall again explained that the plain meaning of the words of a criminal statute should control:

> The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. . . . It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.

United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820).

Therefore, "In the construction of a penal statute, it is well settled, also, that all reasonable doubts concerning its meaning ought to operate in favor of the respondent." *Harrison v. Vose*, 50 U.S. (9 How.) 372, 378 (1850). Or Justice Henry Brockholst Livingston, when circuit-riding, wrote: "If it be the duty of a jury to acquit where such doubts exist concerning a fact, it is equally incumbent on a judge not to apply the law to a case where he labours under the same uncertainty as

to the meaning of the legislature." *The Enterprise*, 8 F. Cas. 732, 734 (C.C.D.N.Y. 1810) (No. 4,499).

BATFE's Final Rule argues in effect that bump stocks are "of kindred character" to "machineguns." But BATFE had made ten previous determinations, over eleven years, that bump stocks are not "machineguns" as defined by the NFA.[11] They do not cause more than one bullet to leave a firearm with "a single function of the trigger." When a rule-making agency cannot agree with *itself* on a statute's meaning, this Court should construe the criminal statute narrowly and apply the rule of lenity using the reasonable doubt standard. The Court should hold the BATFE regulation invalid.

Congress knows how to ban bump stock possession, should it choose to do so. *See, e.g.,* H.R. 396, 118th Cong., 1st Sess. (2023); S. 1909, 118th Cong., 1st Sess. (2023) (proposing banning bump stocks and many other items, some of which might implicate the Second Amendment); S. 1916, 115th Cong., 2d Sess. (2018) (same).

B. Rules of interpretation should encourage, not discourage, clear definitions in criminal statutes.

"[F]ederal crimes 'are solely creatures of statute.'" *Dixon v. United States*, 548 U.S. 1, 12 (2006) (quoting *Liparota v. United States*, 471 U.S. 419, 424 (1985)); *see*

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[11] *See supra* n.3.

also Whalen v. United States, 445 U.S. 684, 698 (1980) (the power to define crimes and punishments "resides wholly with the Congress"); *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812) (federal courts have no common law criminal jurisdiction). Hence, "Congress, in writing statutes and the federal courts in interpreting them, do not have the full benefit of the common law's wisdom and experience." Harvey Silverglate & Monica Shah, *The Degradation of the "Void for Vagueness" Doctrine: Reversing Convictions While Saving the Unfathomable "Honest Services Fraud" Statute*, 2010 Cato Sup. Ct. Rev. 201, 219. Congress therefore has always had a particularly strong duty to draft criminal statutes with clear definitions.

Starting with the New Deal, there has been a massive proliferation of federal criminal statutes, which shows little sign of slowing. *See, e.g.,* GianCarlo Canaparo, Patrick McLaughlin, Jonathan Nelson, & Liya Palagashvili, *Count the Code: Quantifying Federalization of Criminal Statutes*, Heritage Foundation (Jan. 7, 2022).[12]

Establishing penal offenses that deprive individuals of life, liberty or property are among the most weighty actions that Congress can take under its enumerated Article I, section 8 powers. When courts apply the rule of lenity, they encourage careful drafting.

"Only the people's elected representatives in Congress have the power to write new federal criminal

[12] https://www.heritage.org/crime-and-justice/report/count-the-code-quantifying-federalization-criminal-statutes.

laws." *Gallardo v. Barr*, 968 F.3d 1053, 1059 (9th Cir. 2020) (citation omitted). Accounting for the heightened scrutiny, fair notice, and due process imbued in the Constitution, Congress when creating new penal laws must draft with precision and clarity. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (in the context of constitutional rights, "[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."); *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1137 (9th Cir. 2000) ("When a criminal law implicates [constitutional] concerns, the law must be 'sufficiently clear so as to allow persons of 'ordinary intelligence a reasonable opportunity to know what is prohibited.'' ").

It has been claimed that allowing *Chevron* deference to trump the rule of lenity is respectful of the separation of powers. *See Guedes v. BATFE*, 920 F.3d 1, 27 (D.C. Cir. 2019) To the contrary, the rule of lenity serves a crucial separation of powers function, holding Congress accountable for its work. The rule:

> [P]laces the weight of inertia upon the party *that can best induce Congress to speak more clearly*, forcing the government to seek any clarifying changes to the law rather than impose the costs of ambiguity on presumptively free persons. In this way, the rule helps keep the power of punishment firmly "in the legislative, not in the judicial department."

Wooden v. United States, 142 S. Ct. 1063, 1083 (2022) (Gorsuch, J., and Sotomayor, J., concurring) (emphasis added).

When enacting criminal laws, Congress has the duty to write clear, precise instructions for the Executive and Judicial Branches. If the Court expects Congress to speak clearly, it must not allow the Executive Branch a free hand with ambiguously written statutes. Otherwise Congress has every political incentive to evade democratic accountability by shirking decisions to unelected administrators. Such shirking is the opposite of the constitutional function of Congress.

In the best tradition of our separation of powers jurisprudence, this Court should apply the criminal laws that Congress has written with unmistakable clarity. If there is reasonable doubt as to meaning, Congress can remove the doubt with new legislation.

A decision in favor of Respondent will lead to better-written laws. In the long run, such laws make the judicial task of federal criminal statutory interpretation easier. Although this Court and the lower federal courts will benefit, the most important beneficiaries will be the American people, who have the constitutional right to be criminally punished only for transgression of clear, legislatively enacted laws.

CONCLUSION

The decision below should be affirmed.

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Respectfully submitted,

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